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Supreme Court, U.S.
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No. 92-8579

In The

SUPREME COURT OF THE UNITED STATES

April Term, 1993

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS, individually, and in their official capacity as police officers for the Ada County Sheriff's Office; VAUGHN KILLEEN as Sheriff of Ada County; and the COUNTY OF ADA,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

JAMES J. DAVIS
Attorney at Law
960 Broadway, Suite 302
P. O. Box 8126
Boise, Idaho 83707
Telephone: (208) 336-3244

Counsel of Record for Respondents

QUESTIONS PRESENTED FOR REVIEW

1. When the affirmative defense of qualified immunity is raised by a defendant in a civil rights action, who has the burden of proving whether the law is clearly established?

2. If the burden of proof is on the plaintiff, and the plaintiff fails to provide applicable case law which shows the law was clearly established, should summary judgment be granted to defendant?

3. Whether the Petition for a Writ of Certiorari should be granted when, regardless of how the burden of proof issues are resolved, defendant is entitled to qualified immunity because the law was not clearly established.

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STATEMENT OF THE CASE

A.

STATEMENT OF FACTS

Petitioner, Charles K. Elder ("Elder")[1], was charged in the State of Florida with two felonies: aggravated battery and dealing in stolen property. On April 22, 1987, when he failed to appear for his arraignments, warrants were issued for his arrest.

Two days later, Respondent, R. D. Holloway ("Holloway")[2], a Lieutenant in the Ada County Sheriff's Department, following up on information provided by a Boise City Police Officer, contacted an informant who said Elder was in Boise, Idaho. The informant told Holloway that Elder had purchased a gun; Elder was very anti-police; Elder had nearly killed two people in Florida by beating them with a pool cue; and ". . . he was going to shoot it out with law enforcement if anyone attempted to arrest him . . ." on the Florida warrants. The Boise City Officer who initially spoke with the informant classified Elder as armed and "extremely dangerous."

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[1] The Petition for a Writ of Certiorari identifies Elder as the sole Petitioner. Elder's alleged common law wife was a party plaintiff in this action and has remained a party through the appeal. Apparently, she does not join in this appeal. Her right to join in the Petition for a Writ of Certiorari is barred. Supreme Court Rule 12.2. It may be that to qualify for in forma pauperis status under Supreme Court Rule 39.1 the alleged common law wife's claim has been abandoned.

[2] The Petition for a Writ of Certiorari identifies Holloway and "Other Unknown Employees And/Or Agents" as Respondents. Elder's Complaint also named as Defendants the Ada County Sheriff Vaughn Killeen and the County of Ada. Elder's purpose in not including them in the caption as Respondents is not clear. See n.3. Regardless of who is an appropriate Respondent, for purposes of clarity all Respondents will be referred to as "Holloway."

After obtaining certified copies of the Florida warrants, on April 27, 1987, Holloway and other officers attempted to serve the warrants on Elder at an outdoor location. Holloway learned that Elder was employed by a tree cutting service. Holloway contacted Elder's employer and learned that Elder would be at an outdoor job site on April 27, 1987. Arrangements were made with the employer to arrest Elder there. When the officers arrived at the job site, they learned that Elder's employer had told him that the police were looking for him. Elder had left the job site with his brother William Elder and they had in their possession a .44 caliber handgun.

Upon learning that Elder had left the job site, Holloway and the other deputies drove to the area where Elder was residing with his brother William. They parked some distance away and were waiting for Elder to leave the residence so they could arrest him. Holloway did not intend to arrest Elder in the residence. He hoped to survey the residence, spot Elder leaving, and then arrest him. During this time the two Elder brothers were observed loading camping equipment into a pickup truck, and it appeared the two brothers had exchanged clothing with each other a number of times. A short time later William Elder rode a horse away from the house, at which point the Ada County Sheriff's Deputies stopped him to find out the status of his brother. William Elder did indicate that his brother was in the house along with a number of firearms. He also said his brother would resist arrest.

At this point the officers tried calling Elder on the telephone but he would not answer. Then William Elder was asked to

contact his brother by use of a loudspeaker. He told his brother to answer the phone. Thereafter, William Elder telephoned Elder and spoke with him. During this conversation William Elder told his brother that there were cops in the area and "You can't shoot it out with them. You can't win." Holloway also learned at that time that Elder was claiming he had fallen in the crawl space area of the house and hit his head. Holloway was also made aware that Elder was prone to epileptic seizures.

During the telephone conversation between William Elder and Elder, it appeared that Elder may have passed out. Holloway took the phone, whereupon Elder indicated he had fallen, hit his head, was dizzy and did not know if he could walk out of the house. Holloway told Elder he should crawl out the door and onto the grass.

When Elder came out the door, he was walking, not crawling as instructed. He stepped on the front concrete stoop, had a seizure, turned slightly, and then fell, hitting his head on the concrete. Elder was transported to a local hospital by paramedics. Elder has been left partially paralyzed as a result of the fall on the front stoop.

B.

PROCEEDINGS AND DISPOSITION IN LOWER COURTS

Elder's Complaint sought damages under myriad theories alleging violation of federal civil rights and commission of state law torts. The gist of the Complaint, however, was that Elder had been arrested in his residence without an Idaho warrant and with no exigent circumstances justifying the arrest. Cross-Motions for

Summary Judgment were filed. Elder's summary judgment asked the court to find as a matter of law that his arrest was unconstitutional because, although he was not arrested inside, he was "constructively" arrested when he became aware of the officers' presence outside. Holloway's Motion for Summary Judgment[3] requested a ruling that he had qualified immunity for the arrest since the law was not clearly established whether a warrant was required where the officers intended to arrest the person outside; conducted surveillance to locate the suspect at an outside location; and contacted Elder in the residence only after being discovered. The District Court granted Holloway's Motion for Summary Judgment. The only issue Elder appealed to the Ninth Circuit was the qualified immunity issue. The Ninth Circuit affirmed in an Opinion dated December 19, 1991. It then reaffirmed

[3] As stated in n.2, Elder's Complaint named as Defendants Ada County, Idaho and the Ada County Sheriff's Department. All of the Defendants moved for summary judgment on several grounds. In addition to granting summary judgment to Holloway on the qualified immunity issue, the district court: (1) Denied Cross-Motions as to the validity of the arrest on the basis that genuine issues of material fact existed. (2) Denied Holloway's Motion that exigent circumstances justified the arrest on the basis that there were genuine issues of material fact. (3) Granted Ada County, Idaho's and the Ada County Sheriff's Motion on the basis that Elder had failed to offer any evidence of an official policy. (4) Granted summary judgment as to the state law claims.

The summary judgment granted to Ada County, Idaho and the Ada County Sheriff -- based upon Elder's failure to prove the existence of an "official policy" -- was not appealed. That may explain why Ada County, Idaho and the Ada County Sheriff are not identified in the caption of the Petition for a Writ of Certiorari. See n.2. It is inappropriate, then, for Elder to bring this appeal against Holloway in his official capacity (as is shown in the caption) since that claim was resolved adversely to Elder and has not been appealed.

in an Amended Opinion dated September 17, 1992.[4] Elder then filed a Petition for Rehearing With Suggestion for Rehearing En Banc which was denied in an Order dated January 27, 1993.

Elder appeals the Order denying the Petition for Rehearing with Suggestion for Rehearing En Banc. The sole issue presented by Elder's Petition for a Writ of Certiorari is the qualified immunity afforded to Holloway by the District Court.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because the Ninth Circuit's Amended Opinion does not, contrary to Elder's arguments, conflict with applicable decisions of this Court. Further, the Petition for a Writ of Certiorari should be denied because Holloway is entitled to qualified immunity since the law was not clearly established whether a law enforcement officer could conduct surveillance of a personal residence with the intent of arresting the suspected felon once he left the residence.

ARGUMENT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S AMENDED OPINION DOES NOT, CONTRARY TO ELDER'S ARGUMENTS, CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Amended Opinion is consistent with Supreme Court precedent on qualified immunity. Applicable decisions from this Court establish that a law enforcement officer sued in his

[4] Elder failed to advise this Court of the issuance of the Amended Opinion and failed to provide a copy as an attachment to the Petition for a Writ of Certiorari. A copy is attached hereto as Exhibit A.

individual capacity under 42 U.S.C. § 1983 is entitled to qualified immunity when the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Pierson v. Ray, 386 U.S. 547 (1967). The inquiry is an objective one to be determined by the judge as a matter of law on a motion for summary judgment. Harlow v. Fitzgerald, supra, at 818-819. The breadth of the inquiry concerning whether the law is clearly established must be particularized such that the contours of the right are sufficiently defined so a reasonable law enforcement officer understands his conduct violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). When a law enforcement officer asserts qualified immunity, the plaintiff must show that the law was clearly established at the time the officer acted. Davis v. Scherer, 468 U.S. 183, 197 (1984).

The Ninth Circuit's Amended Opinion recognizes and follows this Court's precedent on qualified immunity. The Amended Opinion held that plaintiff has the burden of proof of showing that the law was clearly established. When the plaintiff fails to meet that burden the law enforcement officer is entitled to summary judgment on the issue of qualified immunity. The result reached by the Ninth Circuit is not only consistent with this Court's decisions, it is predictable. Davis v. Scherer's holding that plaintiff must "show" the rights were clearly established to overcome the immunity afforded a government actor necessitates that the plaintiff present the court with the appropriate case law.

Elder failed to do so. Holloway is, therefore, entitled to qualified immunity under this Court's decisions.

To better understand the issue presented to this Court the context in which Holloway was granted summary judgment on qualified immunity and why the summary judgment was affirmed by the Ninth Circuit must be reviewed. Holloway did not enter Elder's residence to arrest him. In fact, Holloway attempted to arrest Elder outside his place of employment. Holloway only went to Elder's residence to determine whether Elder was there. Once it was determined that Elder was there, surveillance was conducted with the hope that Elder would leave the residence and could be arrested away from the house. The plan failed when William Elder left the house and became aware of the officer's presence. With William Elder's assistance Elder was contacted and requested to come outside. Elder did so but had an epileptic seizure on the front stoop, fell, and was injured.

Elder and Holloway filed Cross-Motions for Summary Judgment on the issue of whether the arrest was constitutional. The parties did not dispute that a warrant is necessary to arrest someone in a personal residence absent exigent circumstances, Payton v. New York, 445 U.S. 573 (1980), and that a warrant is not necessary to arrest in a public place, United States v. Watson, 423 U.S. 411 (1976). It was Elder's position that his arrest occurred within the residence and that a warrant was, therefore, required. To make that argument, Elder took the position that Holloway had made a "constructive entry" into the residence by

"surrounding" the residence and by contacting Elder by loudspeaker and telephone.

With regard to the constitutionality of the arrest, Holloway took the position that the arrest was constitutional because it occurred outdoors or because it was justified by exigent circumstances. The District Court refused to grant summary judgment to either party on the constitutionality of the arrest since there were genuine issues of material fact which precluded the granting of summary judgment. The District Court reached that conclusion after reviewing, and distinguishing the case law offered by Elder and noting that no Idaho or Ninth Circuit law could be found which addressed Elder's "constructive entry" theory. Relying upon the analysis of an Eighth Circuit case, Duncan v. Storie, 869 F.2d 1100 (8th Cir.), cert. denied, 493 U.S. 852 (1989), which postdated Elder's arrest, the District Court held there were genuine issues of material fact concerning ". . . whether Mr. Elder placed himself voluntarily in a public place, and whether he willingly relinquished his expectation of privacy." Memorandum Opinion and Order, p. 17.

In addition to the Motion for Summary Judgment on the issue of the constitutionality of the arrest, Holloway sought summary judgment on the affirmative defense of qualified immunity. In response, Elder relied upon the same legal authority he had advanced with regard to the constitutionality of the arrest. Elder did not present any Idaho or Ninth Circuit cases on the constructive entry issue. The District Court granted summary judgment on qualified immunity because Elder's proffered case law

was easily distinguished and no other law was offered which supported Elder's constructive entry theory. The District Court analyzed the issue as follows:

> However, the law is not clear -- in fact, the court has found no controlling Idaho or Ninth Circuit case law -- on the issue of "constructive crossing of the threshold." The law is uncertain as to what even constitutes a "constructive crossing." These questions appear to be questions of fact, that must be dealt with on a case-by-case basis. There is certainly no statutory or case law that provides that a constructive crossing of the threshold occurs when the officers surround the house, and then attempt to make contact with the individual in the home.
>
> Therefore, the defendants in this case could not have been violating plaintiff's clearly established right when the law was far from certain as to when a constructive entry occurs, and there exists no official policy relating to getting a suspect out of his home by telephone or police loudspeaker. There is no way that any individual officer, under the circumstances of this case, could have known that he was violating another's clearly established constitutional rights when those rights were not yet clearly established. Until the law is better defined, it appears to this court that officers in similar circumstances could make an arrest outside the home if they in good faith believe that they could effectuate the arrest without violating any clearly established constitutional rights. The officers in this case clearly acted reasonably under the circumstances as it was their understanding of the law, and it was provided for in Ada County's arrest and custody policy, that as long as they made the arrest outside the home, they could make the arrest without an Idaho arrest warrant. It appears from the record that the officers reasonably believed that their actions were constitutional; therefore, no liability attaches to their actions.
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> Memorandum Opinion and Order, pp. 21-22.

On appeal to the Ninth Circuit, Elder challenged the District Court's analysis of the qualified immunity issue and continued to advance his constructive entry theory. He relied upon the same cases presented to the District Court. At oral argument, the panel asked why a Ninth Circuit case -- United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1986) -- was not dispositive of this case.[5] Elder's response was that the case was distinguishable.[6]

With that background, the Ninth Circuit's Amended Opinion can be analyzed. The Amended Opinion begins by adopting the analysis applied by the District Court in granting summary judgment. In so doing, it recognized that the cases presented by Elder in support of his "constructive entry" theory did not clearly establish whether Elder's arrest was constitutional.

The Amended Opinion could not end there, however, because the circuit court on its own initiative became aware of the Al-Azzawy decision. According to the Amended Opinion, Al-Azzawy ". . . might have alerted a reasonable officer to the constitutional implication of putting a suspect under arrest after he had

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[5] The Al-Azzawy decision will be discussed in the next section of this brief.

[6] Elder's position that Al-Azzawy is distinguishable can be explained. The ultimate holding in Al-Azzawy was that an arrest under circumstances very similar to Elder's was constitutional because of exigent circumstances. If Elder had argued Al-Azzawy applied, Holloway would have been entitled to summary judgment on the issue of the constitutionality of the arrest. Holloway would also have been entitled to summary judgment on the qualified immunity issue because a reasonable officer having knowledge of the similarity between Al-Azzawy and Elder's arrest could have believed that the arrest was constitutional.

come outside his house pursuant to an order to exit." Amended Opinion, pp. 5-6. In light of Al-Azzawy's potential for placing a law enforcement officer "on notice" of clearly established law, the issue defined by the Ninth Circuit was:

> . . . whether a summary judgment on qualified immunity in favor of a law enforcement officer which was properly granted on the record presented to the district court, should nevertheless be reversed because there are legal authorities that plaintiff did not present to the district court or to us on appeal which suggest that, contrary to what the district court found, the law was clearly established at the time of the incident.
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> Amended Opinion, p. 2.

The Ninth Circuit answered the issue in the negative -- the summary judgment would not be reversed -- because Elder had the burden in the District Court of showing clearly established law, which he failed to do. The Ninth Circuit has long recognized that the plaintiff has the burden of showing clearly established law. See, Amended Opinion, pp. 6-7 and n.2. Elder's failure to present the one case which even arguably supported his position entitled Holloway to summary judgment.

The Ninth Circuit's limited holding is that it was not reversible error by the District Court to fail to supply Plaintiff with the case law to support his case. Amended Opinion, p. 16. That was so, particularly since even when the Ninth Circuit Panel asked Elder about Al-Azzawy's application to the case, he argued it was distinguishable.

> Given our adversary system, we are unwilling to say that Elder should be stuck with our take on a case that his counsel thinks is distinguishable, but rather believe that when

> the plaintiff has the burden of adducing the legal facts necessary to prove that the law was clearly established, the record upon which that determination is made is his call rather than ours.
>
> Amended Opinion, p. 16.

In the final analysis, the holding in the Amended Opinion is that where a plaintiff in a civil rights case is confronted with a qualified immunity defense, he must make a showing that his clearly established rights were violated. When that burden is not met, qualified immunity is granted. That holding is entirely consistent with Davis v. Scherer, supra, and this Court's other qualified immunity cases. It is also consistent with the vast majority of circuit courts of appeal which have considered the issue. Hilliard v. City and County of Denver, 930 F.2d 1516 (10th Cir. 1991), cert. denied 112 S.Ct. 656, 116 L.Ed.2d 748, ____ U.S. ____ (1991); Courson v. McMillian, 939 F.2d 1479 (11th Cir. 1991); Wegener v. City of Covington, 933 F.2d 390 (6th Cir. 1991); Cooper v. Sheriff, Lubbock County Texas, 929 F.2d 1078 (5th Cir. 1991); and Abel v. Miller, 824 F.2d 1522 (7th Cir. 1987).

Elder's argument in his Petition for a Writ of Certiorari that the Amended Opinion is inconsistent with Supreme Court precedent should be viewed carefully. Elder, as already noted, ignores the Amended Opinion. He did not supply the Amended Opinion to this Court and did not compare the Amended Opinion to this Court's precedent. In so doing, Elder improperly defined the issue on appeal and mischaracterized the Ninth Circuit's decision. Elder defined the issue as ". . . whether a party on appeal may rely only on those authorities cited to the District Court." Petition for a

Writ of Certiorari, p. i. He then argues that he was precluded by the Ninth Circuit from relying upon Al-Azzawy because he did not cite it to the District Court. Petition for a Writ of Certiorari, p. 6. The argument is not based on fact. Elder, instead, argued at the Ninth Circuit that Al-Azzawy was distinguishable from the present case. The Ninth Circuit was not prepared to substitute its judgment for Elder's. Its decision to not do so is not inconsistent with this Court's decisions.

II.

> THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE HOLLOWAY IS ENTITLED TO QUALIFIED IMMUNITY SINCE THE LAW WAS NOT CLEARLY ESTABLISHED WHETHER A LAW ENFORCEMENT OFFICER COULD CONDUCT SURVEILLANCE OF A PERSONAL RESIDENCE WITH THE INTENT OF ARRESTING THE SUSPECTED FELON ONCE HE LEFT THE RESIDENCE.

Regardless of which party may have the burden of proof on showing clearly established law, this Court should deny the Petition for a Writ of Certiorari because a reasonable officer under the circumstances of Elder's arrest would not have known whether he was violating clearly established rights. As discussed in the previous section of this brief, the law is clear under Payton that a warrantless arrest cannot be accomplished in a personal residence without exigent circumstances and is equally clear under Watson that a warrantless arrest can be made in a public place. The difficulty is determining whether Elder's arrest came within the decision in Payton or the decision in Watson. The law at the time of Elder's arrest had not clearly defined the issue.

The most analogous case decided by this Court was United States v. Santana, 427 U.S. 38 (1976). Santana involved the arrest of a suspect who was standing in the doorway when the officers arrived at the personal residence. Recognizing that if the person was deemed to have been in the household, a warrantless arrest would not have been appropriate, this Court held that a person standing in the doorway does not have an expectation of privacy. In other words, the suspect was in a public place. 427 U.S. at 42.

The most closely analogous case in the Ninth Circuit, which applied Santana, was United States v. Botero, 589 F.2d 430 (9th Cir. 1979), cert. denied, 441 U.S. 944 (1979). In that case, the Ninth Circuit affirmed the conviction of two individuals for drug related charges. One of the issues on appeal was the warrantless entry into an apartment to make an arrest. The law enforcement officers involved went to the apartment, knocked on the door, and when Botero answered it, they arrested him in the open doorway. On appeal Botero asserted that he was improperly arrested in his home without a warrant. Relying upon Santana, the Ninth Circuit held that Botero could be arrested when he answered the door without the requirement of a warrant.

It is difficult to comprehend how a reasonable officer faced with Holloway's situation could have believed that using a loudspeaker and telephone to contact the individual inside the home was any different than the officer's conduct in Botero in knocking on the door and arresting Botero when he came into the open doorway. Holloway, because he was concerned with the safety of himself and his officers, chose to make contact with Elder by

loudspeaker and telephone. Certainly, that contact with Elder is less intrusive than the conduct of the officers in Botero.

The holding in Botero is more significant to this case than would appear at first blush. Other courts, when confronted with the same issue addressed in Botero, have concluded that an arrest in the doorway cannot be accomplished without a warrant. It was that line of cases upon which Elder relied in making his "constructive entry" argument. Where there is a split of authority among the courts, a law enforcement officer's actions ought to be justified if the federal circuit court of appeals in his area has sanctioned the conduct. At a minimum, it cannot be said in such a situation that there was clearly established law.[7]

Even if Elder had relied upon Al-Azzawy in the District Court as applicable precedent, Holloway would still be entitled to qualified immunity. Al-Azzawy involved a disturbance at a trailer park. A witness informed the officers that an occupant of the trailer park had threatened to shoot him, to blow up the trailer

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[7] The inquiry concerning whether there was clearly established law under the circumstances of Elder's arrest may be so narrow that Santana and its progeny are not applicable precedent. Anderson v. Creighton, supra, teaches that the contours of the right which is allegedly violated must be sufficiently clear that a reasonable official would understand that what he was doing violated the person's rights. All of the cases cited to the District Court concern circumstances where the officers went to the front door of the residence and the suspect was arrested somewhere near the doorway. Here, Holloway merely attempted to survey the residence and arrest Elder when he voluntarily exited. The only Ninth Circuit precedent to have addressed the latter issue postdates Elder's arrest but does suggest that a surveillance and subsequent arrest is constitutional. United States v. George, 883 F.2d 1407, 1415 (9th Cir. 1989) ("We believe . . . that the officers could have conducted surveillance of the premises and . . . awaited appellant's exit to effect a valid public arrest . . . .").

park and burn the witness' trailer. It was reported to the police that the suspect (Al-Azzawy) had a pistol, a hand grenade and automatic weapons. The police surrounded the trailer with guns drawn and ordered the suspect out of the trailer.

Al-Azzawy was charged with possession of unregistered firearms and being an illegal alien in possession of a firearm. In response to Al-Azzawy's motion to exclude evidence on the basis that he had been arrested in his home without a warrant, the District Court ordered the evidence excluded.

Whether Al-Azzawy was arrested in the trailer or outside the trailer according to the court determined whether the evidence would be excluded. The court did hold that because Al-Azzawy was not free to leave the trailer and his freedom of movement was totally restricted there was an arrest inside the trailer. The inquiry did not end there. The Ninth Circuit determined that the arrest was justified on exigent circumstances.

> . . . [I]f the officers reasonably believe that Appellee possessed illegal explosives and was in an agitated and violent state, there was sufficiently substantial risk to human life to justify a warrantless arrest. (citation omitted)
>
> 784 F.2d at 894.

Al-Azzawy is distinguishable from the present case. Here, the officers went to the residence where Elder was residing only after they unsuccessfully attempted to arrest him outside, and conducted surveillance with the intent of arresting him once he voluntarily exited. In Al-Azzawy the officers went to the trailer, surrounded it with guns drawn, and ordered Al-Azzawy to come

outside. In addition, the portion of the Al-Azzawy decision which determined that an arrest occurred within the residence, is dicta. See, Amended Opinion, p. 5. The holding in Al-Azzawy was that exigent circumstances justified the arrest and permitted admission of the evidence obtained from within the trailer.

Finally, Al-Azzawy actually benefited Holloway's position, not Elder's. The facts in Al-Azzawy are less compelling than those in this case to justify an arrest under exigent circumstances. Al-Azzawy's possession of illegal explosives and his agitated and violent state posed a substantial risk to human life which constituted exigent circumstances. Elder's possession of numerous firearms, the officers' reasonable belief that Elder was extremely dangerous and the information that he would shoot it out with the police also posed a substantial risk to human life. If Elder had relied upon Al-Azzawy, it is likely Holloway would have been granted summary judgment on the basis that the arrest was constitutional -- justified by exigent circumstances. The District Court also could have granted summary judgment to Holloway on the qualified immunity issue because a reasonable officer having read Al-Azzawy would think that he had exigent circumstances to justify Elder's arrest.

Elder very strongly relies in the Petition for a Writ of Certiorari upon the Dissents' Opinions in the Order denying the Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc. The problem with Judge Kozinski's dissent is that he interprets Al-Azzawy as establishing that the law was clearly established at the time Elder was arrested. Judge Reinhardt's

dissent, on the other hand, properly notes that the Amended Opinion interpreted Al-Azzawy differently and recognizes that it is the Amended Opinion's interpretation of the case which must be accepted as its holding. Order, p. 601, n.4.

When judges cannot agree that a case constitutes clearly established law and the plaintiff's lawyer argues the case is distinguishable, the law cannot be clearly established. A law enforcement officer cannot be expected to know what legally trained individuals cannot agree upon. The purpose of providing law enforcement officers with qualified immunity is to protect them from liability in this very situation.

CONCLUSION

The Petition for a Writ of Certiorari should be denied on either of two bases. First, the Ninth Circuit's Amended Opinion is consistent with Supreme Court precedent. Second, Holloway is entitled to qualified immunity because the law concerning Elder's arrest was not clearly established at the time of his arrest.

Respectfully submitted this 28th day of May, 1993.

JAMES J. DAVIS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 17 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CHARLES K. ELDER; BEVERLY S. ELDER, husband and wife, Plaintiffs - Appellants, v. R. D. HOLLOWAY; OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al., Defendants - Appellees.	No. 91-35146 D.C. No. CV-88-1329-HLR AMENDED OPINION

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted October 8, 1991
Seattle, Washington

Filed December 19, 1991
Amended: September 17, 1992

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges

Opinion by Judge Rymer

RYMER, Circuit Judge:

This is a 42 U.S.C. § 1983 action in which Charles Elder claims that his constitutional right not to be arrested inside his home without a valid Idaho warrant was violated when law enforcement officers, after setting up armed surveillance, called him to come outside the house and arrested him on the porch. In opposition to the officers' motion for summary judgment on qualified immunity, Elder proffered three out-of-state cases to

EXHIBIT A

show that the law was clearly established that a warrant was required to make a "constructive entry" into the house. The district court found on the basis of those cases that the law was not clear, and ruled in favor of the officers. We agree with the district court's analysis. There is, however, Ninth Circuit authority which was not called to the attention of the district court that might have alerted a reasonable officer to the constitutional implications of putting a suspect under arrest after he had come outside his house pursuant to an order to exit.

Elder's appeal thus raises a narrow question: whether a summary judgment on qualified immunity in favor of a law enforcement officer which was properly granted on the record presented to the district court, should nevertheless be reversed because there are legal authorities that plaintiff did not present to the district court or to us on appeal which suggest that, contrary to what the district court found, the law was clearly established at the time of the incident. Because the plaintiff in a § 1983 action confronted with a request for judgment on grounds of qualified immunity bears the burden of proving that the constitutional right allegedly violated was clearly established at the time of the incident, we affirm.

I

After receiving word that Charles Elder, who was wanted on Florida warrants and considered dangerous, was in town, officer R.D. Holloway and others in the Ada County Sheriff's Office made plans to arrest him outside his place of work. Elder and his

brother William got wind of the officers' plans, however, left work early, and returned to William's house (where Elder was living, too). Holloway and a number of other officers set up surveillance at the house. When William tried to ride away on horseback, he was detained. Officers found out that Elder had access to weapons in the house. Eventually, Holloway and William made telephone contact with Elder, who meanwhile had suffered two epileptic seizures. Holloway advised him that if he was unable to walk out of the house, he should crawl. Elder walked out a few minutes later, but fell face down, hitting his head and sustaining severe injuries. This happened on April 27, 1987.

Elder's complaint alleges that these events violated his constitutional right not to be arrested in his home without a valid Idaho warrant. Both parties moved for summary judgment.

On the issue of qualified immunity, Elder argued in the district court that the law was clearly established that an Idaho warrant was required to make a "constructive entry" over the threshold. He proffered Payton v. New York, 445 U.S. 573 (1980), for the proposition that, as of April 27, 1987 (when the incident occurred), it was clearly established that the Fourth Amendment prohibited a warrantless entry into a suspect's home to make a routine felony arrest absent consent or exigent circumstances. No one disputed this general principle, and the district court correctly recognized that the law, where there is an actual entry into the home, is clearly established.

Nor did the parties disagree about "the level of generality at which the relevant 'legal rule' is to be identified." Anderson

v. Creighton, 483 U.S. 635, 639 (1987). They disagreed whether, in 1987, there was binding precedent which clearly established when an arrest "constructively" takes place inside a house if no law enforcement officer steps inside the door and the suspect is physically placed under arrest outside the door. Elder proffered three cases in support of his claim that the law clearly established that there was a "constructive entry": State v. Holeman, 693 P.2d 89 (Wash. 1985), State v. Morse, 480 A.2d 183 (N.H. 1984), and Scroggins v. State, 633 S.W.2d 33 (Ark. 1982). The district court reviewed the cases identified by Elder and found there was no controlling Idaho or Ninth Circuit case law on the issue of "constructive entry." That being so, it concluded that the officers could not have violated Elder's clearly established rights when the law was not clear as to when a constructive entry occurs, and the officers could reasonably have believed they could effectuate an arrest outside the door without violating any clearly established right.

On appeal, Elder argues that the law was clearly established that the officers were required to have an Idaho warrant prior to ordering him out of the house, because the facts constitute a constructive crossing of the threshold. Elder identifies the same cases as showing that the law was clearly established that the arrest constructively occurred inside rather than outside his house, as he did in the district court -- Holeman, Morse, and Scroggins -- and also relies on Duncan v. Storie, 869 F.2d 1100 (8th Cir.), cert. denied, 493 U.S. 852 (1989). Duncan post-dates the incident and is therefore not material; it does, however, cite

to United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985), cert. denied, 476 U.S. 1144 (1986).

In Al-Azzawy, police surrounded the suspect's house and, with weapons drawn, ordered him to leave. When he emerged, he was taken into custody. We held that exigent circumstances justified the warrantless arrest. Before reaching this issue, however, we first addressed the question whether the arrest had taken place inside the suspect's house; if not, the issue of exigent circumstances would have been moot. We determined that, even though the suspect had exited the house and was physically seized outside, he was in fact "arrested inside his residence without a warrant." Id. at 893. In so concluding, we reaffirmed the rule that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." Id. (quoting United States v. Johnson, 626 F.2d 753, 757 (9th Cir. 1980), aff'd on other grounds, 457 U.S. 537 (1982)). Since we reversed the district court "on the grounds that the warrantless arrest and search were justified by exigent circumstances," id. at 895, our conclusion as to where the arrest took place may be regarded as dicta, unnecessary to this result.

We have no difficulty with the district court's decision on the record it was presented. No case Elder identified clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enforcement officers who have surrounded the premises.

We are, however, troubled by the possibility that Al-Azzawy's initial conclusion might have alerted a reasonable officer to the

constitutional implications of putting a suspect under arrest after he had come outside his house pursuant to an order to exit. Despite the opportunity at oral argument and subsequent briefing, neither party has shed much light on whether Al-Azzawy requires us to reverse despite Elder's failure to rely on it.[1]

"[T]he determination of whether [a] right was so 'clearly established' as to alert a reasonable officer to its constitutional parameters" presents a "pure question[] of law." Romero v. Kitsap County, 931 F.2d 624, 627-28 (9th Cir. 1991); see also Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (referring to the "essentially legal question" of qualified good faith immunity). At the same time, "[t]he plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct. If plaintiff carries this burden, then the officers must prove that their conduct was reasonable even though it might have violated constitutional standards." Romero, 931 F.2d at 627 (citations omitted); Maraziti v. First Interstate Bank, 953 F.2d 520, 523 (9th Cir. 1992).

II

In § 1983 actions where qualified immunity is at issue, it has been the rule that the plaintiff bears the burden of showing that the fact-specific constitutional right allegedly violated was

[1] Elder's view is that "all cases are distinguishable." We assume he takes this position because of Al-Azzawy's ultimate holding, that exigent circumstances justified the officers' conduct in that case. That holding ultimately cuts against Elder in this action, and may explain why he did not proffer Al-Azzawy in opposition to Holloway's motion.

clearly established at the time of the incident since Davis v. Scherer, 468 U.S. 183 (1984), and Bothke v. Fluor Eng'rs and Constructors, Inc., 739 F.2d 484 (9th Cir. 1984), following Davis in this circuit. In Davis, the Supreme Court held that "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue." 468 U.S. at 197.

Our court has reiterated the burden of proof rule a dozen times since Bothke,[2] but until now we have not been called upon to reconcile it with the equally well settled rule that the determination of whether the constitutional right was clearly established presents an issue of law. We believe that neither rule can be ignored, and hold that the plaintiff's burden in responding to a request for judgment based on qualified immunity is to identify the universe of statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established. The district court's determination of whether that universe of authority clearly established the law so

[2] Maraziti, 953 F.2d at 523; Romero, 931 F.2d at 627; Bryant v. United States Treasury Dep't, 903 F.2d 717 (9th Cir. 1990), rev'd, Hunter v. Bryant, 112 S. Ct. 534 (1991); DiMartini v. Ferrin, 889 F.2d 922, 927-29 (9th Cir. 1989), amended on other grounds, 906 F.2d 465 (9th Cir. 1990), cert. denied, 111 S. Ct. 2796 (1991); Baker v. Racansky, 887 F.2d 183, 186 (9th Cir. 1989); Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988), cert. denied, 490 U.S. 1075 (1989); Bothke v. Fluor Eng'rs & Constructors, Inc., 834 F.2d 804, 808 (9th Cir. 1987); Tomer v. Gates, 811 F.2d 1240 (9th Cir. 1987); Backlund v. Barnhart, 778 F.2d 1386, 1389-90 (9th Cir. 1985); Fendler v. United States Parole Comm'n, 774 F.2d 975, 980 (9th Cir. 1985).

as to alert a reasonable officer to the constitutional parameters of the right allegedly violated is an issue of law, as to which our review is de novo.

A

Under the rule of Davis v. Scherer, a defendant is presumed to be immune from damages unless the plaintiff shows that the right allegedly violated was clearly established at the time of the conduct at issue. 468 U.S. at 197. Thus, Holloway had qualified immunity unless Elder overcame it by "showing" that the right not to have his house constructively entered was clearly established (or that there are triable issues of fact that must be resolved before a determination can be made whether, as to those specific facts, the law was clearly established). If the plaintiff is not expected to make any "showing" except as to what happened factually, leaving it to the court to come up with the relevant universe of authority from which to find whether the law was clearly established, the Davis rule would be flipped on its head.

Expecting the plaintiff to identify all potentially relevant authorities that bear on the court's determination of whether the law was clearly established comports with the Supreme Court's recent approach to qualified immunity. From Harlow v. Fitzgerald, 457 U.S. 800 (1982), through Davis and Anderson, 483 U.S. at 635, to Hunter v. Bryant, 112 S. Ct. 534 (1991), the Court has made qualified immunity the presumptive norm. which can be overcome if the plaintiff shows that the contours of a fact-specific right are

so clear that a reasonable official would understand that what he is doing violates that right. Requiring the plaintiff to identify the universe of authority that is relevant to the fact-specific right allegedly violated follows naturally from this direction.

While most of our qualified immunity opinions make no mention of who came up with the relevant authority, we have in practice looked to the cases identified by the plaintiff. On several occasions, after stating that the plaintiff bears the burden of proof, we have explicitly indicated which cases the plaintiff identifies, and have discussed only those cases in resolving the appeal. See, e.g., Romero, 931 F.2d at 629 (plaintiffs maintain that despite federal law, decisions of state courts demonstrate law was clearly established; they cite particular case, which court finds did not adjudicate right at issue); Baker v. Racansky, 887 F.2d 183, 188 (9th Cir. 1989) (plaintiffs rely on four cases which they assert clearly established right to hearing or warrant); Backlund v. Barnhart, 778 F.2d 1386, 1389 (9th Cir. 1985) (plaintiffs must show they had clearly established right to exercise religious beliefs about punishment on foster care child; "[t]hey fail to cite any pertinent authority on this issue").[3] At

[3] We simply make explicit in this case what was implicit in Backlund, where we said:

> We do not hold that Section 1983 plaintiffs must always find a case on point in their favor to show that their rights were clearly established. Certainly they need not always produce binding precedent. Capoeman v. Reed, 754 F.2d 1512, 1514-15 (9th Cir. 1985). There may be cases of conduct so egregious that any reasonable person would have recognized a constitutional violation. The Backlunds have failed to show that this was such a case. Indeed, they have failed to show a violation of any constitutional right, clearly established or not.

least two other circuits have indicated that a plaintiff, in order to carry his burden of proving that the law was clearly established (and thus to avoid summary judgment in favor of the defendant), must specifically identify the clearly established law. See Pueblo Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988) (burden is on plaintiff to identify clearly established law; if plaintiff fails to carry this burden, defendant prevails); see also, e.g., Upton v. Thompson, 930 F.2d 1209, 1212 (7th Cir. 1991) ("To prove the presence of a clearly established constitutional right, the plaintiff must point to 'closely analogous cases' decided prior to the defendants' challenged actions."), cert. denied, 112 S. Ct. 1262 (1992).

We therefore hold that in opposing an official's request for judgment based on qualified immunity, the plaintiff's burden includes identifying the universe of relevant statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established. Imposing the burden of proving that the right was clearly established means that a § 1983 plaintiff, confronted with a challenge on grounds of qualified immunity, must show that the particular facts of his case support a claim of clearly established right, and he loses if he does not come forward with statutory or decisional law on which the court can find that the constitutional right allegedly violated was clearly established. See Backlund, 778 F.2d at 1389.

Backlund, 778 F.2d at 1390 (footnote omitted).

B

Although qualified immunity is an "essentially legal question," Mitchell v. Forsyth, 472 U.S. at 526, neither the trial court nor the court of appeals decides what the law is, but instead the question is whether the law with respect to a fact-specific set of circumstances was "so 'clearly established' as to alert a reasonable officer to its constitutional parameters." Romero, 931 F.2d at 627. Whether a right was clearly established requires consideration of legal facts, that is, it requires a balancing by the judge of such things as whether any court has held that a particular constitutional right exists or that conduct similar to that of the officers in the case at hand violates that constitutional right, the number of times the particular right has been recognized and under what circumstances, whether the alleged constitutional right was apparent from the cases even if it had not been expressly recognized, how clear the holdings were, which courts made the decisions, and whether in light of those decisions, a reasonable officer could have believed his conduct to be lawful. The nature of this determination, in light of the burden of proof imposed on the plaintiff to show that the law was clearly established, distinguishes the legal inquiry in qualified immunity cases from both the ordinary civil case and others where constitutional issues are presented. These differences lead us to conclude that appellate review of the resulting determination is appropriately limited to whether the district court erred in concluding that the plaintiff failed to meet his burden on the record of authorities the plaintiff produced.

Whereas normally, a district court has to get an issue of law right, and it does not matter which party presents which authorities (or whether the court uncovers them itself) because the court's decision on a purely legal issue is either right or wrong "as a matter of law," imposing the burden of proving that the law was clearly established on the plaintiff -- as we do in the unique context of qualified immunity -- is without meaning unless the plaintiff has an obligation to produce the legal facts from which the court can determine what the state of the law was at the point of time in the past when the incident occurred. In the ordinary case, the party asserting a claim or defense may have the practical burden of convincing a judge that the law favors his position in the present, but that differs from a legal burden of showing how clearly the law was established at a given point in the past. There may, indeed, be no law that bears on the issue at all, but in the ordinary case that does not mean the proponent will lose. It does, however, mean that the plaintiff must lose in the context of qualified immunity unless the officers' conduct was "so egregious that any reasonable person would have recognized a constitutional violation." Backlund, 778 F.2d at 1390.

Similarly, in other cases where constitutional issues are adjudicated, courts declare what the law is (no matter how fuzzy the precedents), but that is a different obligation from determining what the law with respect to an alleged constitutional right was, and how clear it was. When, for example, the issue on a motion to suppress is whether police officers violated a suspect's constitutional rights by coercing him into a confession,

there is no question that the district court must divine and apply the law correctly, no matter what cases are cited by the parties. The court of appeals has a correlative obligation to correct error when it occurs. But that is not the task when addressing whether government officials are entitled to qualified immunity from damages. The difference has long been recognized, for, as we stated in Backlund, "qualified immunity shields an official from liability for damages only, not from a finding that he violated constitutional rights." 778 F.2d at 1389 n.3 (citing Davis, 468 U.S. at 192-93).

Courts of appeals do not invariably reverse in a civil case whenever a district court gets the law wrong on an issue of law, even if the consequence is that the result would otherwise be different. We do when the legal question is whether a claim for relief is stated, or whether a party is entitled to judgment as a matter of law. We do not when the question is whether instructions accurately state the law, and the party claiming error did not object, see, e.g., Hammer v. Gross, 932 F.2d 842, 847-48 (9th Cir.) (en banc), cert. denied, 112 S. Ct. 582 (1991); Benigni v. City of Hemet, 879 F.2d 473, 477 (9th Cir. 1988); Martinelli v. City of Beaumont, 820 F.2d 1491, 1493-94 (9th Cir. 1987), or invited the error about which he complains on appeal. See, e.g., Benigni, 879 F.2d at 477.[4]

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[4] We also, of course, do not consider legal issues not raised or ruled upon in the district court. Examples include those matters that can be urged by way of a Rule 12 motion that are waived unless made with the answer, see, e.g., Fed. R. Civ. P. 12(h)(1) (defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process waived if omitted from pre-answer motion, if any, or

The determination of whether a specific right was clearly established is closer to the latter kind of "issue of law" than the former. In an adversary system where the plaintiff has the burden of showing that a specific right was clearly established in the law, if the court "gets it wrong" because the universe of cases proffered by the plaintiff in support of his claim that the right was clearly established turns out to be less than all of the potentially relevant legal facts, the plaintiff has invited whatever error occurs.

Defining the plaintiff's burden to include identification of relevant authority in the unique context of qualified immunity should have no unsettling effect on the orderly development of constitutional law. So far as the particular case is concerned, the district court may still find that the plaintiff's

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answer); Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986) (A "general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction."), amended on other grounds, 807 F.2d 1514 (9th Cir.), cert. denied, 484 U.S. 870 (1987); Chilicky v. Schweiker, 796 F.2d 1131, 1135-36 (9th Cir. 1986) (if party files pre-answer motion but fails to raise defense of lack of personal jurisdiction in that motion, defense is waived), rev'd on other grounds, 487 U.S. 412 (1988); and issues that could have been joined by a motion for directed verdict, but cannot be pressed on appeal unless that motion is made, see, e.g., Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1493 (9th Cir. 1986) (sufficiency of evidence not reviewable on appeal unless motion for directed verdict was made in trial court); United States v. 33.5 Acres of Land, 789 F.2d 1396, 1400 (9th Cir. 1986) (same, but noting limited exception for plain error resulting in manifest miscarriage of justice). We never consider facts not presented to the district court. United States v. Elias, 921 F.2d 870, 874 (9th Cir. 1990). And, the relevant record on review of summary judgments is the record as it existed at the time the motion was considered. Harkins Amusement Enters., Inc. v. General Cinema Corp., 850 F.2d 477, 482 (9th Cir. 1988), cert. denied, 488 U.S. 1019 (1989).

constitutional rights were violated even though at the time of the incident, the right was not so clearly established that an official should have to respond in damages for his conduct. Backlund, 778 F.2d at 1389 n.3 (citing Davis, 468 U.S. at 192-93). By the same token, an appellate decision that the district court did not err on the record before it in determining that a right was not clearly established based on the universe of authorities produced by the plaintiff is precedential only on whether the specific right allegedly violated was clearly established at a particular point in time, see Baker, 887 F.2d at 187 (post-incident cases which considered whether law governing child abuse investigations was clearly established in 1986, at time of incident in question, are relevant persuasive authority on this issue); it has no precedential effect on whether such a constitutional right exists or was violated, or as to a subsequent case where the record is different.

Accordingly, we shall review the district court's determination that a § 1983 plaintiff has (or has not) met the burden of showing that the law was clearly established for purposes of overcoming an official's request for judgment on grounds of qualified immunity for whether its conclusion was correct based on the legal facts identified by the plaintiff.

III

Our holding does not mean that it is inappropriate for a district court to come up with relevant law on its own, anymore than it is inappropriate for a district judge to ask questions and

thereby elicit evidence on his own. However, the district court has no obligation to do either in the unique context of qualified immunity. Where the plaintiff bears the burden of proof that the law was clearly established, as the plaintiff does in overcoming a request for judgment on the ground of qualified immunity, and based on the record adduced fails to meet it, we hold only that the district court does not commit reversible error by failing to fill in the holes.

We are satisfied that no injustice results to Elder. First, the unproffered authority, Al-Azzawy, is not entirely advantageous. Because our ultimate holding in that case was expressly grounded on the conclusion that exigent circumstances justified the suspect's arrest and the subsequent warrantless search, 784 F.2d at 895, our initial conclusion that the arrest had taken place "inside" the house was unnecessary dicta. Given our adversary system, we are unwilling to say that Elder should be stuck with our take on a case that his counsel thinks is distinguishable, but rather believe that when the plaintiff has the burden of adducing the legal facts necessary to prove that the law was clearly established, the record upon which that determination is made is his call rather than ours. Second, assuming that Elder's failure to proffer Al-Azzawy was inadvertent, and the district judge did not find it either, we are hard-pressed to say that the law was so clearly established that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right. See Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir.

1986) (the court does not "require of most government officials the kind of legal scholarship normally associated with law professors and academicians"), cert. denied, 483 U.S. 1020 (1987).

For these reasons we conclude that the plaintiff in a § 1983 action, who bears the burden of showing that the constitutional right allegedly violated was clearly established at the time of the alleged misconduct, must identify the body of law which proves that the right was so clearly established that a reasonable officer would be alerted to its constitutional parameters. If the universe of statutory or decisional law proffered by the plaintiff does not show that the right allegedly violated was clearly established at the time of the incident, the district court does not commit reversible error by considering only the legal facts presented and determining, correctly, that based on those legal facts the plaintiff has not shown that the contours of the right were clear.

AFFIRMED.